IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DISTRICT

KNOWLEDGE ECOLOGY INTERNATIONAL,	:	
Plaintiff,	:	Case No. 20-02927-PJM
v.	:	
NATIONAL INSTITUTES OF HEALTH,	:	
Defendant.	:	Greenbelt, Maryland
	:	December 22, 2021

TELECONFERENCE

BEFORE: THE MAGISTRATE JUDGE CHARLES B. DAY

APPEARANCES:

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I N D E X

Keynote: "---" indicates inaudible in transcript.

P R O C E E D I N G S

(Whereupon, the teleconference began.)

THE COURT: Okay, we are on the record in the case of Knowledge Ecology versus NIH. Case number 20-2927. If I can have counsel identify themselves for the record.

MS. ARDIZZONE: Good afternoon, Kathryn Ardizzone for Plaintiff Knowledge Ecology International.

THE COURT: Thank you. Welcome.

MR. LAZEROW: Good afternoon, Your Honor, it is Alan Lazerow from the U.S. Attorney's Office for NIH.

THE COURT: Good afternoon. Welcome. Okay, I have received and reviewed your papers regarding ECF number 8. Plaintiff's motion to expedite release of records and for scheduling order. So it is Plaintiff's motion, I will give Plaintiff first and last opportunity to make argument.

MS. ARDIZZONE: May it please the Court, Counsel. We are here today about matters of the upmost interest to the American public and they are also extremely time sensitive. The records we are seeking pertaining to the NIH's response to the COVID 19 pandemic and its efforts to secure access to COVID 19's vaccines and treatments and diagnostics, laws that will be help put an end to the pandemic that has claimed 800,000 American lines and transformed nearly ever facet of American life.

We are also seeking records related to how the NIH

performs its statutory duties and possible reasons that it is refusing to exercise existing legal options and its power to utilize right now to protect Americans from the unreasonable prices of tax payer funded inventions. This also is one of the most pressing issues of our day. Eight out of ten Americans polled said that the most important policy priority for them is lowering the excessive price of prescription medicines. And 1 out of 4 to 1 out of 5 Americans do not take their prescribed medicines as their doctor prescribed it due to cost because they cannot afford to do so. Which is harming health outcomes in the United States.

KEI has a very strong track record of using information obtained under the Freedom of Information Act or the FOIA to inform and influence the policy debates and public debates of matters of national concern. Most recently with respect to the pandemic, we have been much more successful in our effort to obtain records from the Department of Health and Human Services and the Department of Defense, which together lead Operation Warp Speed. The Trump administration initiative to fund the development of vaccines and treatments on a rapid basis.

And in June of 2020, we were the first organization to obtain Operation Warp Speed contracts and using our subject matter, expertise on intellectual property law, we informed the public through our relationships with media

outlets such as Axios and National Public Radio, that Operation Warp Speed was using a loop hole to weaken public interest safeguards that are normally prescribed by Federal law in the results of these massive contracts --- in some cases a billion dollars to pharmaceutical companies to fund the development of vaccines.

In a case where access and affordability would be extremely important, the Government was weakening its rates. And so, we shared this with major news outlets. They published our analysis in the records and Congress questioned shortly thereafter the head of BARTA(sic) which is part of HHS and executes the contracts and Francis Collins the director of the NIH, about why it used a loop hole to weaken public interest safeguards.

--- we have obtained 400 contracts which we publish on our website and we also maintained a spreadsheet of metadata and analysis of the contracts that has been consulted by policy makers, members of the press and activist because there has been enormous public interest expressed in the terms of the contracts, which is similar to what we are trying to obtain but have been unable to obtain from the NIH. And we have been quoted in at least 191 news articles about intellectual property rates in the pandemic since the start of the pandemic.

But it has been a very different experience with

the National Institutes of Health and the Defendant has frustrated the intent of the FOIA and made it enormously difficult to obtain any information of substance and value on a timely basis. But the issue that we are here to discuss -- we are all here to decide is the appropriate processing rate and whether the Defendant's proposed rate of production of 300 pages promotes for 2 consolidated lawsuits seeking information of important national and time sensitive issues satisfies the purpose and time constraints of the FOIA which are the law of the land when there are more than 312,000 pages outstanding to be prefaced(sic).

At the Defendant's proposed rate, that would result in an 86 year production time line, if we do not narrow the scope of any of the outstanding requests. But we have expressed our willingness to do so. But we don't want to lose the public interest in timely access to these records of great importance to the American public. So we sent a detailed proposal to the NIH about the possible ways to narrow the scope of this request that we recently learned has 296,000 pages of outstanding records.

We have not yet heard back from the NIH about how that would impact the page count. And we are optimistic about that. But even assuming best case scenario in that we can reduce 75 percent of the outstanding pages, at Defendant's proposal, you would have a production time line

and litigation time line of 21 years. And that is in no way permitted by the FOIA which is not a loose set of guidelines for agencies to ignore. It is the law of the land, as I have said and it recognizes not just the public's access to information about what the Government is doing but also the importance of timely access to information because stale information is of little or no value.

Your Honor, if I can just give you an example of how the NIH's unreasonable delay has frustrated the intent of the FOIA. Early in the pandemic, we learned that there is an NIH funded treatment called Remdesivir, that would be really important because it was one of the only treatment options for the only FDA authorized treatment options for COVID 19. There was an enormous public interest in the terms in which the NIH might have held rights on Remdesivir because the NIH helped fund its development.

And there was a letter sent by State Attorney's General including the current secretary of HHS Xavier Becerra, then he was the Attorney General of California stating that the Government should exercise margin rights to expand access to Remdesivir because access was limited. We had submitted -- as soon as we learned that it was --- in March of 2020, we submitted a FOIA requested. In --- paper, which was published by the *Washington Post* stating that we would update the paper once we learned more information

through the FOIA.

But the NIH quickly acknowledged it and granted us expedited treatment but six months into the pandemic, we were being approached by CNN about the NIH's role in Remdesivir and we could not answer their question. We could only say that our request was pending because the NIH still had not acted on it.

So a public debate was relevant in the summer of 2020, it cannot be --- back. It is wordy --- and hampered by lack of access to information and it cannot be wound back as the case law recognizes. Because it was important in at a type back then, and now we are nearly two years into the pandemic and society has moved on to other issues. So it was the less informed and less debate than it could have been.

But we have --- request at issue and we have extensively briefed the public interest in them. And I am being long-winded, so I will just move on to the legal -- oh sorry, I do want to update the Court about information that has come to light since we have briefed the motion to expedite.

So when we briefed the motion to expedite, we had an estimated page count for all but one of the requests. We had repeatedly asked the NIH to provide an estimated page count for request number 54015. Which seeks records related to Active, which is an NIH program to coordinate the

development of vaccines and treatments for COVID 19. Initially the NIH denied that request in full even though we submitted the FOIA request after the program was launched, the NIH said it was still being worked out so everything was exempt.

So we have appealed that saying, not just as that defies logic but here is an example of a contract that was already executed. It is responsive to the request and it is not pre-decisional, it has been executed. So, we have filed an administrative appeal. We have put that in our complaint. In the answer, NIH still stated that it had not wrongfully withheld information.

But in February of 2021, we convinced -- we got them to admit that it may have wrongfully withheld information and it would perform a search. But by the time that we needed to brief the motion to expedite because time was -- crucial time was passing, it didn't give us an estimated page count. So we had to brief the issues without that information.

Not until October of 2021, just a few months ago did the NIH inform us that there are 296,000 pages responsive to that request. That is a fact that is transformational. Because we have extensively surveyed the case law. And the FOIA is (technical interference) -- the FOIA's time constraints which are extremely important and of greater

importance when requests are entitled to expedition, which we submit they are, do not permit a five year long time span, an eight year long time span of production. Certainly not a 21 year time span of production which is the best case scenario.

So it is a factor that has direct bearing on how the Court must decide the legal issues at hand and how the courts do decide the legal issues at hand. And the Court should have had the benefit of that information and so should we. So if we have a -- if we had --- considered the page count that we requested Your Honor, to order, and it was based on the number of pages that we thought were outstanding which was 20,000. That number is many times that amount. So if we had known that, we would have requested 2,000 per month in the 2927 lawsuit, which relates to COVID 19 and has a heightened time sensitive nature, because it relates to the pandemic.

And we would have requested -- we would have requested 500 pages in the 2825 lawsuit. So, we wanted to highlight that issue for Your Honor. The other important new fact does come to light is that the director of the NIH, Francis Collins announced his departure from the NIH in October of 2021. He will be departing by the end of the year. And the oldest request at issue from 2018 pertains to his correspondence of the pharmaceutical industry.

If the requestor can file a request in 2018, and

then not even obtain records until the director of the NIH has left his position and there is a new director, his legacy is not as important -- the FOIA is eviscerated in that case.

THE COURT: Isn't that the same request in which you did not seek expedition?

MS. ARDIZZONE: Yes. So the -- I -- we did not originally because we did not foresee a four year time line for production. And at that point, we did not have that information that he would be leaving office imminently. So this is new information.

So, the legal analysis that the Court must apply arises from the time constraints of the FOIA and the cases that have analyzed the question before us which provide persuasive case law because they mostly have been discussed in the United States District Court for the District of Columbia but provide helpful parameters. The FOIA recognizes the public's right to timely access to information which is the structural necessity in a functioning democracy. There is an overriding and compelling public interest in fulfillment of that.

So it does have time constraints for a non-expediting request. That means, that the agency must respond to the request for records within 20 working days. And then thereafter, must make the records promptly available. What that means is context dependant, but it means typically weeks

or months not days or years and the cases I have reviewed, it has not been more than 3 years generally. It certainly has not been 8 years -- 10 years especially when there is a compelling public interest in the records sought.

For an expedited request, the expedited processing provisions were enacted later through an amendment, but it is a heightened standard. The spectra of information becoming stale and of --- value increases. So Congress underscored the importance of timely information where the request that can demonstrate the compelling need.

For the first request in the 2927 lawsuit, which sought records related to Remdesivir and the COVID 19 pandemic context, the NIH did grant a request for expedited processing. So recognizing that we have shown a compelling need. The later request related to the pandemic which had the same material facts. It either was silent on our request for expedited processing or denied it, which we submit was in error. But anyway, the rebuttable presumption arises in those cases if records are not provided within 20 working days.

As I said, there is no one rigid formula you can apply. It is context specific. So, in a case where there is only 800 pages outstanding, even if there is a very highly important public interest as there was in the American Immigrant Council versus DHS, 400 pages was ordered as an

appropriate processing rate because there were only 800 pages outstanding. Meaning that the requestor would have a full set of records in two months. That was found to be reasonable.

But other cases such as Huddleston versus the FBI, were the agency complained of the impact of COVID 19 on its operations. That was only one concern that the Court balanced and it also considered the FOIA's timing constraints and said that the Defendant's proposal -- this would --

THE COURT: Uh oh. Looks like I lost you. Are you still there Mr. Lazerow?

MR. LAZEROW: I am here. Can you hear me, Your Honor?

THE COURT: Yes, I can.

Ms. Ardizzone? We lost you. Hopefully she will come back --

MS. ARDIZZONE: ---

THE COURT: There you are. Okay. You froze on us a little bit there. High winds, I know, but go right ahead.

MS. ARDIZZONE: Sorry I am just trying to --- the fact that it is context dependant. It depends on factors. The courts have identified in a number of cases, you review the case law and they start to emerge. One of them is of course, the public interest and whether the requests were entitled to expedition, which we submit ours were.

So in a case that did not order an expedited processing rate which is Middle East Forum which these cases are all in the motion, the Court said we are not going to order an accelerated rate of production here. That is because we may have if the requests were entitled to expedition but none of them were.

In another case, Negli(sic) and Trevera(sic), the requestor was only seeking records related to their personal interest and there was no greater interest in the public at large that would be served by an expedited rate of fulfillment. So --

THE COURT: I think I have to give you about two more minutes.

MS. ARDIZZONE: Okay. So it depends on the context. It depends on the public interest. The time sensitive nature of an ongoing event of International concern. Whether the request which were entitled to expedition, which the ones we are seeking an accelerated rate from what would be the normal case, were entitled to expedition.

Whether -- another factor that the NIH did not acknowledge was the fact that there is overlap between our requests and the 2927 lawsuit about the NIH COVID 19 response and any increase in the number of requests that it received because of the pandemic. Because naturally the public is --

it only underscores the public interest in records about how the NIH's responds to the pandemic and if it fulfills our requests it will help do the work of fulfilling other requests in the queue. Not only because we publish our information and get the information to the public through our media channels and our website but because it can directly provide those records to others.

It is defending a lawsuit right now brought by public citizen for one FOIA request that is related to the active partnership. It is almost identical to 54015. The only case discussion if you can even call it that, that the Defendant provides in its opposition, essentially argues a court ordered us to provide 300 pages a month in this case called Daily Caller. The Plaintiff didn't agree to that. But the Court ordered it in that case and so that should be the processing rate in this case.

But it failed to mention the fact that that order came from a --- order that didn't educe the Court's reasoning or rationale, but more importantly that case had only 4,200 pages outstanding. That was an appropriate processing rate because it would have resulted in a production time line of 14 months. We have 75 times more pages outstanding in this case. So you can't compare apples to oranges. That is -- that is not the case analysis and that is not how courts decide the issue.

If the Court orders 2,500 pages a month, which is 2,000 in COVID related case and 500 a month in the non-COVID related case, that would result in 2.6 year time line, which is not within the realm of what is reasonable. If the Court's production stands -- I mean, if the Court's rate of production stands, that is a 20 year -- 21 year time span and that would be a truly extreme and outrageous order that would set a very harmful precedent to people trying -- to agencies that would prefer secrecy.

THE COURT: And I think your time is up.

MS. ARDIZZONE: Okay.

THE COURT: Thank you.

MS. ARDIZZONE: Thank you, Your Honor.

THE COURT: I will hear from the Defense.

MR. LAZEROW: Thank you, Your Honor. I want to three things. I wanted to update the Court as where things stand visa vie, the NIH FOIA office since we are now some time after the papers were filed. I want to address some of the cases that Plaintiff cites and why the Court should sort of disregard them. And three, I want to address the -- the couple other issues which -- because there are issues not just relating to the processing count but the processing issue but there are also issues about how the information is being processed.

And the one thing I want to say at the outset is,

we are talking about a rate of processing, not a rate of production. And so to the extent that I say production, I really mean processing. And that is a distinction because the FOIA office could review a document and decide that the entire thing is entitled to be withheld. That is a page that is processed but would not necessarily be turned over to a FOIA requestor. And I just wanted to get that out of the way because I am sure I am going to say production at some point when really I mean processing.

It is no -- it is no secret that we are all still dealing with this pandemic. It is in the newspapers, it is on the news, it is on my Twitter feed. It is dominating the attention of all of us and it is dominating the attention of NIH and the -- and the American Healthcare Community. So unsurprisingly folks like KEI who are interested in the American Healthcare Community and COVID 19 specifically, are all the more so and still interested in the work that NIH is doing and that has continued to exacerbate things at the NIH FOIA office. Just by the numbers.

NIH pre-pandemic was actively litigating three FOIA lawsuits. NIH typically was sued about once a month. Sorry about once a year under FOIA. At the time we filed our opposition, that number was 15 active litigations. Less than six months later, that number is at 33 active litigations. What we put in our papers was we said, Your Honor, if the

Court was going to require processing more than 300 pages per month, NIH would have to devote a fourth person -- there were already three senior staff members whose job was solely responding not just to FOIA requests or expedited FOIA requests, litigation based FOIA requests, where we said a fourth person would have to be detailed to cover that.

Well, NIH has been processing 300 pages a month in this litigation and that still has happened. There has been a fourth person that has been detailed to only work on litigation requests. The back log as a result has increased from 491 overdue requests to 639 overdue requests. Before the pandemic NIH was processing in litigation 300 pages per month. At the time that we filed our opposition, that number was 3,200 pages per month. So more than 10 times that. Less than 6 months later, that number is 6,250 pages per month.

So, it has almost doubled again. So, if this hearing was back in March, our position would have been was then and would still be that NIH can only process 300 pages per month and things have only gotten worse for NIH and it has only gotten worse as a result for the NIH FOIA office. So that is sort of just the quick update as to where things stand at NIH and in the FOIA office.

Now, Plaintiff refers to a number of cases where some court ordered some agency to produce more than 300

pages. Some of them were COVID era cases. A lot of them were not. But it is not -- but the most important part for me to highlight to the Court is that this is not KEI versus the FBI. This is not KEI versus HHS or DOD. It is frankly of no surprise to me that they are getting better service, so to speak, faster response from those agencies.

Because NIH and not those agencies is the Defendant in this case. And why is that important? Well, when someone makes a FOIA request, the FOIA offices go to the individuals with the relevant information, the relevant programs. And those foot soldiers, so to speak, the folks on the ground at the agency are -- they have to work with the FOIA office. They have to search their e-mails, they have to look through their physical files. They have to have discussions about whether to apply a particular FOIA exemption.

The difficulty here unlike any other agency is that the people with the information relevant to COVID related FOIA requests are the very experts leading the agencies and the Nation's research efforts regarding the pandemic. So, not to undermine or belittle FOIA or its purposes in any way, but any time that these people -- these foot soldiers so to speak on the ground as I will call them, spend working on responding to FOIA requests, is times that they are not spent working on the pandemic.

So, the best bench marks are not pre-pandemic cases

or even pandemic cases involving different agencies, it is pandemic cases involving NIH. What I can tell the Court and represent to the Court is that in almost every case, NIH is processing 300 pages per month. And I say in almost every case, I am actually not aware of a case where they are producing more to anybody else but you know, less I say in no case are they producing more and somebody finds a case where they are. I will say that in almost every case, NIH is processing 300 pages per month.

I can represent to the Court that NIH spreads these cases amongst its agency attorney's staff as the Court can imagine. The agency council working with me on this case, has four other pieces of active FOIA litigation that are in processing. Each of them are being processed at a rate of 300 pages per month. So I think in Plaintiff's motion they said a floor of 500 pages per month. And I know now they said well it would have been 2,500 -- 2,000 pages per month but those are arbitrary because a lot of the cases don't deal with pandemic related cases and they don't deal with NIH. And the specific issues that NIH is facing.

Now, to be fair, in those other cases, I would -- suffice it to say the number of outstanding documents is probably less than there are in this case. And we will talk about how I think that -- how I think that gets fixed. But frankly it is not NIH's fault that Plaintiff's FOIA request

has many more responsive pages then other cases and the point that we are making here is the effect on the agency if ordered to produce or rather process more than 300 pages per month.

That effect is going to be the same regardless of whether the number of outstanding pages is 1,500, 15,000 or 15 million. So, we think the best benchmark is the other cases where that NIH is producing documents in right now and those cases -- again every case that I am aware of but I will say almost every case NIH is processing 300, 300 pages per month.

Now, let me just say that you know, yes there was a response that I think the number of potentially responsive documents was 296,000. That is a -- that is a big number. We sent -- we have been in contact and we have suggested, well if you had a secondary search term that number goes from 296,000 to 24,000. That is one way it could get narrowed down.

A day or two ago, we did receive a proposal from the NIH about how to possibly narrow it down again. Listen, these requests need to get narrowed down but I will say is that KEI about a month ago came to us and said, we actually want to re-prioritize from one of the requests that there were a large number of documents outstanding and we want to switch to a different request.

So because we are currently processing a different request where I think there is maybe 12 or -- 1,100 or 1,200 pages outstanding, that will take a couple of months unless the Court orders otherwise. That gives us time to negotiate these issues. I did just want to address this one more point about how the -- about some requests about how the documents should be produced and then maybe offer a proposal to the Court to the extent the Court doesn't already know what it is going to order.

The two issues I wanted to address are Plaintiff's request not in its FOIA request but during litigation that we OCR or make the documents text searchable. And the fact that it wants the documents at the request, again not in its FOIA request but during litigation to prioritize certain -- call it reverse chronological order. What FOIA requires is the agency to provide documents in the form or format requested by the requestor and these are the important words, if the record is readily reproducible by the agency.

So what has happened here is NIH goes to its components, goes to its people, it gets documents, it loads it in to its reviewing system withholdings are made, redactions are made and then it spits out PDFs that we produced to KEI and every other FOIA request every month. As a part of that process, the documents are typically scrubbed for metadata, making them unsearchable.

Therefore, as they come out of the system, they are not readily producible by the agency in OCR format. Frankly, I have a license to Adobe. I get medical records in FTCA cases. I want to search them. I can go on there, I can OCR them. The question is, who should be the one to do that? Again even recognize -- even putting aside the fact that the documents as they exist in the system now are not readily reproducible. Should it be KEI who is receiving these 300 plus pages a month or should it be NIH who is processing just in litigation alone, 6,250 pages.

And I assure the Court the amount of pages it is producing in -- outside of litigation is probably many, many, many times that. It is -- it just knowing how long it takes for me to OCR documents, for an office that is already being crushed to have to take that extra time would add to the crush. The last issue, relates to reverse chronological order. The documents are loaded into NIH's -- at least to the request where there are a large number of documents loaded into NIH's FOIA reviewing software.

What Plaintiff would have us do is pull all of that out, put everything in different buckets. This is in the 2021 bucket, this is in the 2020 bucket, this is in the 2019 bucket. OCRing documents would be time consuming. Requiring NIH to do that would be -- I mean, would be frankly impossible. So certainly they are not readily reproducible

by the agency in that format.

I think what needs to happen here is I do think there needs to be some schedule under which the parties attempt to narrow the request where are 296,000 pages outstanding and perhaps we can come back to the Court with hey, here is how we have resolved it. Or if not, here are the parties respective positions on how to narrow this issue. How to narrow these documents or not.

In the -- attached to the opposition was a proposed order. We think quarterly joint status reports where the parties can update the Court as to the status of the productions and be heard as to whether there should be an increase in the processing rate, I think is also appropriate. But NIH is acting in good faith here. This case is about 8 FOIA requests, 3 of which have been cleared off of the table. A 4th one will be cleared off the table in the next 3 to 4 months.

And once we are able to narrow these other requests down, it will be more manageable. This is not an 80 year production schedule. This is -- I don't know if it is one year, three years or what have you. But I am hopeful that we will be able to narrow this down significantly. The last thing I will offer the Court and the Plaintiff to the extent this is helpful is that in about 3 to 4 months, we will have 4 of the 8 FOIA requests completed.

Now, what happens in these cases of course as Your Honor knows is that documents are produced and perhaps a Plaintiff won't challenge redactions or withholdings and perhaps -- or the adequacy of the search, perhaps they will. What might make sense and we would be amenable to doing is once this fourth request is done, it should be again in 3 or so months, we can move to summary -- we -- if Plaintiff -- if Plaintiff challenges the adequacy of the search in cases where there were no documents or challenges the adequacy of the search and withholdings or redactions in -- for requests that there were productions, then we can brief that. We can Von indexes.

And if the Court can tell us that we -- that NIH did what it had to or didn't under FOIA but that is perhaps one way that half of this case could move to summary judgement relatively quickly. With that, I am happy to answer any questions. But -- unless the Court has any other questions, I will take a virtual seat.

THE COURT: Not at this time but I do want to give Plaintiff about 5 minutes for rebuttal if you wish.

MS. ARDIZZONE: Thank you, Your Honor. And I apologize if my thoughts are a little bit --- because I am responding in real time to all of the things that the Defendant's Counsel has stated. And I think that they are really important and need to be discussed. First and

foremost, what I did not review in the opposition and I did not hear in Defendant's presentation is any acknowledgment of the counter-veiling interesting that the Court must balance. I did not hear any acknowledgment of the time constraints. I did not hear any acknowledgment of the public interest in fulfillment of the FOIA request on a timely basis.

I did not hear any acknowledgment of the overlap between our request and other request outstanding in the queue. And it stated that the Court should disregard the fact that we have had a better experience in other cases. The case that I discussed at the beginning of my presentation is against HHS and DOD. They are major funders of biomedical research but they are leading the COVID response because they are executing operation work for these contracts.

They are not on some side project. Now, the impact on the NIH is one of many relative factors but it is not the be all and end all. I have not read a single case in which a Court accepted an argument that reduced to one factor, the impact on the agency and said that that is an open and shut case. They have actually said hardship on other requesters is not a voluntarily -- relief that we are seeking because again the public interest may outweigh the impact on the agency as it did in --- democracy project, as it did in Hollison versus FBI, including in the context of COVID 19.

If an agency can simply say this would be a burden

on us then the FOIA's time provisions would mean nothing. So it is an incomplete picture of the legal analysis that the Court must perform and it hasn't improved with Counsel's presentation. Now it did provide some examples of cases that it is defending right now, where 300 pages per month was the norm but I don't think that that is the case in every case.

Because one case which is called Leopold versus CDC, a large number of pages were processed to the Defendant. So what matters again is the specifics of those cases. In three cases, that it cites in its opposition, one of those cases, US Right to Know versus NIH, the docket states that production will not begin until December of -- 28th, 2021. So it didn't even begin yet.

But that is a case that the Defendant cited that is making it busy. And the Plaintiff states in its status report that the NHS has given its records that it has already produced in other lawsuits showing how their synergy between --- are requesting other requests. And another case Jadhav(sic) versus NIH, the NIH is providing between 300 and 500 pages a month.

But there the Plaintiff was seeking records -- that referenced himself and he was an individual person. There was no compelling public interest and ---. So again it has given a formula devoid of facts, devoid of context and that is not helpful to the Court's analysis. In saying simply

Your Honor, this is difficult for us so this is going to create a burden on other requesters, so you should not grant the relief that the Plaintiff is seeking, this is not an analysis I have ever seen a single legal precedent applied.

Regarding -- there is another important matter that I would like to bring before Your Honor's attention. Up until November -- up until December of 2021, the only request that the NIH was processing was a request number 54587 seeking e-mails referring to KEI about the exercise of public interest safeguards under the -- in proxy for the exercise of public interests safeguards under the ---.

The NIH estimated that there is 15,000 responsive pages and has been giving us approximately 300 pages per month. But it has been -- we did not request reverse chronological OCR formatting in our original request because we could not foresee that there were be that many e-mails referencing KEI. We are adapting to new information and attempting to preserve the value of FOIA because the Defendant's proposal stands, they will take five years or four to five years to fulfill that request alone.

We have no --

THE COURT: Time is up.

MS. ARDIZZONE: Okay. Thank you, Your Honor.

THE COURT: Thank you. Well, there are a bunch of factors that the Court has to consider here. Congress has

spoken about the need for speed. And it is also the practical realities of just because there is a need doesn't mean that we can reduce everything to a formula of production over so many months or years or decades even. Granted our history is it makes an effort not to allow that to happen but as was thrown up by the Defense, as we are talking 15 million items to be processed, there is -- there is a different formula that has to be in play.

So quantity is a concern. A need for the information in a timely fashion is a concern. The host of balancing factors to be involved here, the Defense offers a process of 300 pages per month. And it talks about that balance approach that we set forth in the Chavari(sic) versus U.S. Immigration and Custom Enforcement, case out of the District of Columbia in 2020.

Pointing out 500 pages per month of non-expedited requests in the COVID environment was going on there. The case was mindful of the impact of the pandemic and relied upon three other recent decisions for that production case. I am persuaded that 2,000 pages per month is appropriate in the absence of more information. That is 2,000 total. Not broken out by 2,000 for this case and 2,000 for that case. 2,000 total. And I know that it is a burden upon the Government and NIH to make that happen.

Maybe the Government will find a solution, a detail

of someone to make that possible. And while this approach may be ---, it may be an approach that addresses the proffered crush of FOIA work in my opinion that this particular agency is facing. And there is the need to have more meaningful production to Plaintiff. And I do need the Plaintiff to set the priority of production where it is doable. Where that won't cause a problem to what is already happening at NIH then, great, let them have some say in terms of what is most important.

It is true that the case law supports the notion that an untimely production is no production at all. Citing that *Washington Post* case of 2006. And I am satisfied that the statutory requirement has been met. That is a compelling need entitling the Plaintiff to expedited process of certain requests. These matters are time sensitive. And sadly this Court's inability to reach this matter sooner has added to that problem.

We in the court as -- are part of the problem. So as I look at these factors, there has already been a significant delay and there has been some significant production. So I applaud the Government on that as well. But to the extent that years are required for completion, that is probably not going to be acceptable. I think there will be a need for quarterly progress reports. I think that was a good suggestion. Appropriate. And as we speak to this

OCR issue, you are right, the statute says that the production is to be made in the format requested if the record is readily producible in that format.

NIH, a system now scrubs those documents eliminating that mega data which allows for such searching and so the Plaintiff can either have the speed of what is in the works or without that OCR or if you would elect to really insist upon ECR, then it is a do over. The Defense will get to start over from scratch and so much for your argument about the need for speed.

I do want to talk about production in the reverse order of these --- e-mails and if that is what you want, fine. You set the agenda for the order in which, the priority of which and we will see if that can't be accommodated. But I think 2,000 reviews per month is a hefty number particularly in this environment, particularly with all that NIH has on its plate. Particularly as it relates to the dissemination of information or research that NIH has to do to gather this information.

Unlike some other agencies where it is warehoused in one central location. I am moved by many of the arguments that NIH makes. But I also agree that it does not take priority over what is the mission and what the FOIA requests, what the FOIA law provides to the Plaintiff. So, let's back up a little bit and talk about these potential quarterly

progress reports.

Is that something that you all can work together on and submit a proposed order for signature?

MS. ARDIZZONE: Yes, Your Honor.

MR. LAZEROW: Sorry, just to be clear, when you say a proposed order, are you referring to an order outlining Your Honor's ruling or is it --

THE COURT: No.

MR. LAZEROW: -- the -- is it something the Court would sign off on on the joint status reports?

THE COURT: That is it. I need a time line for what makes sense for the joint status reports if you will. That is whether you want to talk the first of the month, end of the month, certain day of the month. What kind of information you are expecting to have produced in those reports. As it relates to this particular hearing, there will be no written order so to speak. I will reference the record. There will be a paperless order basically granting in part this motion that has been filed.

But I do want to have some -- I need to have you work together as much as you can. And that is what I am hoping that the progress reports can do for us, at least in terms of beginning the process and articulating if nothing else the priorities and things like that, that the Plaintiff is going to be contemplating.

MS. ARDIZZONE: Your Honor, excuse me for interrupting. We are very amenable to this request and are happy to do anything we can to work together and make this easier for Your Honor. So, for our part, we can do this.

MR. LAZEROW: And of course, the Government will do the same. I mean, frankly what I am envisioning is just an update as to the status of the productions and allowing the parties to -- I do think, even though the ruling is sort of going the other way, that I do think it will be appropriate to allow the parties to be heard as to whether the productions -- the rate of productions should be increased, if that is what Plaintiff would like or lessened based on whatever and to the extent that there is any of these other issues that come up, like OCRing or reverse chronological order, allowing the parties to be heard.

And I assume if the Court wants to get the parties together in this format or otherwise, it would do so -- can I just ask for one clarification.

THE COURT: Yes, but I want to answer the -- or weigh in on the points that you just made.

MR. LAZEROW: I apologize --

THE COURT: I ascribe to all of that. It very well may be that you have produced by that time, half of 8 requests already and they are off the table or at least from your perspective. Maybe that there are dueling views on what

is going on. My hope is that we will get to a place where it will not be as onerous to do some things here. It may be that there are other demands that are coming into play and I may have to adjust the speed or the pressure on that spigot and see what is going on. It is a dynamic situation.

So that is at least the second time you have perceived my approach and I don't know if that is because you are trying to impress me with this glow of light, this halo above your head that you have found some way to adjust specifically for this hearing. Do you have the same halo -- do you see that Ms. Ardizzone -- he is angelic appearance, I don't know.

But continue with your statements, sir.

MR. LAZEROW: I paid extra for that feature here on Zoom. Could I ask that the 2,000 page requirement commence in February of 2021 and the reason for that is we are up against the holidays now, it very well could be that the NIH folks started working on this beforehand and I think to produce almost 7 times what they have been in those two weeks, we typically have been producing on the 16th of the month, would be very difficult and I would ask the Judge to, I would Your Honor to commence that 2,000 page requirement in February.

THE COURT: I will hear from Plaintiff.

MS. ARDIZZONE: Your Honor, it is difficult to

consent to that request without KEI's director being here. I suspect he would say that he doesn't want to ruin anybody's holiday and Your Honor is granting significant relief. So I unfortunately can't be in full agreement or denying to that request however we do not vigorously disagree to that request.

THE COURT: Understood. And I will grant the request. You will have until that time to begin. And it may require the marking of some resources that are not readily available. So I want to give you that opportunity. Good. So with that being said, I will leave it to the two of you to submit something in terms of what we plan to do going forward in terms of these progress reports, status reports or whatever the case may be. But I am hoping that it will be in less than -- no more than two weeks out. We can go with that.

I won't be a stumbling block in terms of anything that you two agree to. I can't imagine that happening. So to the extent that you can give us a path forward, is a pretty good chance that that is the path we will take.

MR. LAZEROW: And just to be clear, what Your Honor is envisioning in two weeks or so is a joint filing outlining perhaps you know, an agreement as to what will be contained in these quarterly joint status reports and perhaps if there is not an agreement outlining those positions.

THE COURT: Yes. As well as the timing that is, when should I expect the first one and the ones thereafter? And of course, anything else that you have in mind bring it to my attention at that time as well and we will try to get through. Okay. All right. Anything further from the Plaintiff?

MS. ARDIZZONE: Your Honor, I know that we are constrained on time and this didn't make it into our presentation but we are concerned that the requests that I mentioned before that has -- it originally had 15,000 pages outstanding. It has 11,000 pages outstanding and a large number of pages each month has been publically available documents.

We want to move things along and make this easier for the Court and for the Defendant and for all parties concerned, so we have asked to exclude publically available documents. But the NIH has not agreed to do so. So, we ask and that is -- is frankly astonishing to us and unreasonable. It is -- justification was initially that doing so would not appreciably reduce the page count. But when that --- to be true, one month we received 150 page package which can easily reviewed online.

The Defendant asked us to propose a methodology for determining what is publically available, which we provided. Then he came back and said that it was difficult for it to

exclude or impossible for it to exclude publically available documents because they would have to do a review. Obviously it doesn't have to review publically available documents for redactions, so I think it meant to say is we would have to do a responsiveness review.

But this doesn't make sense either because any time a party narrows the scope of a FOIA request during litigation, which the public has the overwhelmingly favors the parties doing, then they are getting a new scoped FOIA request and there would be a new responsiveness to review. A new responsiveness review to perform to say this is no longer a responsive document because we have narrowed the request. That is why -- that is intrinsic to any narrowing.

So we continue to think that is unreasonable and ask that the Court order the NIH to exclude publically available documents from the scope of all FOIA requests.

THE COURT: I want to hear from the Defense, but I also ascribe generally to the notion that to the extent that you two can narrow anything is going to be a good thing. I think I heard that from the Defense earlier and it certainly will cut down the work load. But Mr. Lazerow?

MR. LAZEROW: Yes, this is a -- I don't want to say a non-issue but a tiny issue. I have relayed to Plaintiff's Counsel and I will just read a sentence from an e-mail. "As for excluding publically available documents, as to the

documents each month are reviewed by the FOIA -- the FOIA office has tried to remove such documents and will continue to do so -- sorry to do their best to remove these records."

So the FOIA office is committed to doing that. I do think there needs to be some discussion as to what constitutes a publically available document. For instance, an article that is behind a pay wall. Is that publically available? Well, yes, sure if you pay for it, you can get it. Are we excluding that from the production or do we include it because KEI might not be able to access it?

These are again just issues that I think need to be worked out and you know, we are submitting something to the Court in less than two weeks and perhaps -- there is going to be collaboration and we should and will continue to collaborate upon that issue.

THE COURT: Good. Well, it has been teed up and hopefully I won't have to see it again. But if so, then I will address it as best as I can. And as quickly as I can. Okay. That is -- anything else from the Plaintiff's side?

MS. ARDIZZONE: Your Honor, I apologize, my video just came out so I didn't hear the Defendant's entire presentation. My understanding was that the last correspondence we had on this issue, the Defendant said it could not exclude publically available documents because it requires a responsiveness review. So it couldn't make a

commitment to doing so. We have provided parameters. We wish to be as reasonable as possible.

So I believe under our parameters, the payroll(sic) article would not count as that because we discussed documents being readily retrievable. But we will continue -- we will work with the NIH as much as possible on this. Then I am pleased to hear that it is more willing to do this narrowing than otherwise appeared.

THE COURT: It sounds like the holiday spirit is beginning. This is good.

Mr. Lazerow, anything further from your end, sir?

MR. LAZEROW: Nothing from NIH.

THE COURT: Okay. Well I thank you both for your time and your attention and your advocacy and hope you have a blessed season. So, take care.

MR. LAZEROW: Thank you.

MS. ARDIZZONE: Thank you so much.

(Whereupon, the teleconference concluded.)

C E R T I F I C A T E

I certify that the foregoing is correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Lisa N. Contreras 03-28-22

Lisa N. Contreras Date
Certified Transcriber
Certificate No.: CET**D-1251